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SERVICE DATE - MAY 15, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34236

BOLEN-BRUNSON-BELL LUMBER COMPANY, INC.

v.

CSX TRANSPORTATION, INC.

Ex Parte No. 346 (Sub-No. 25)

RAIL GENERAL EXEMPTION AUTHORITY-LUMBER
OR WOOD PRODUCTS¹

Decided: May 9, 2003

In a complaint filed on July 19, 2002, Bolen-Brunson-Bell Lumber Company, Inc. (BBB) alleges that CSX Transportation, Inc. (CSXT) unlawfully maintained an embargo on a 1.1-mile portion of CSXT's Midwest Region, Nashville Division, Memphis Terminal line between milepost ONI 224.0, at Memphis, TN, and milepost ONI 222.9 east of Memphis, in Shelby County, TN (the line). BBB charges that the embargo became unreasonable shortly after it was imposed and that, by continuing the embargo, CSXT violated its common carrier obligation to provide service upon reasonable request under 49 U.S.C. 11101.

BBB seeks a cease and desist order, as well as damages for lost profits and additional transportation-related charges incurred during the time that the embargo was unlawful. Because its complaint concerned the transportation of lumber and wood products, which have, as a class, been exempted from regulation, BBB concurrently filed a petition under 49 U.S.C. 10502(d) for the partial revocation of the class exemption adopted in Rail Exemption – Lumber or Wood Products, 7 I.C.C.2d 673 (1991) (Class Exemption).

¹ These proceedings are not consolidated; a single decision is being issued for administrative convenience.

CSXT filed an answer denying the allegations in the complaint, and the parties filed statements pursuant to the procedural schedule established in a decision served on September 5, 2002, as subsequently modified.²

REVOCATION OF CLASS EXEMPTION

In Class Exemption, our predecessor, the Interstate Commerce Commission (ICC), exempted from regulation the rail transportation of certain lumber and wood products because it found that intermodal competition for the transportation of these products generally protected shippers from abuse of market power by railroads. The ICC noted that, if a shipper believes that a railroad is abusing its market power, the agency retained jurisdiction to revoke the exemption in whole or in part. Id. at 678. Here, BBB wants us to revoke the exemption so that we can act to remedy what it considers an abuse of market power. As discussed below, however, we find that CSXT has not abused any market power it may have, or otherwise acted inappropriately, in initiating and maintaining the embargo. Therefore, we find no reason to revoke the class exemption as to CSXT's movement of lumber and wood products for BBB.

BACKGROUND

BBB, the only shipper on the line, is a wholesale distributor of lumber and forest products. It operates a lumber yard and distribution facility on the line at milepost ONI 223.1, where it receives railcars of forest products consigned to retail dealers in the Memphis area. BBB unloads and stores the shipments for the retail dealers, who may then pick up their products from time to time in smaller loads, as needed. BBB also receives, to a lesser extent, railcars of forest products consigned to its own account. For the year 2000, BBB received 77% of its total shipments by rail. More specifically, BBB received 198 rail shipments, 180 of which were for its transload business³ and consigned to local retail dealers, and 18 of which were for its own account. For the first two months of 2001, BBB received approximately 33 rail carloads.

On March 1, 2001, CSXT embargoed operations over this line as well as a contiguous 12.24-mile line segment between milepost ONI 222.9 and milepost ONI 210.66 near Cordova, TN (Memphis–Cordova line). CSXT imposed the embargo after its Regional Engineer of Structures, Mr. Leeroy Davidson, concluded that two bridges were unsafe. The bridge that is particularly relevant to

² BBB filed its opening statement on October 28, 2002. On November 25, 2002, CSXT filed its reply. BBB filed its rebuttal on December 17, 2002.

³ BBB in its pleadings refers to its business as involving a “reload” operation.

this case is the Cypress Creek bridge, located on the line at milepost ONI 222.3 (the bridge), which CSXT must traverse to serve BBB. The bridge is 80 years old and has been damaged by arson.

The line has remained out of service since the embargo was imposed. Transload services are now performed by other companies at other nearby locations (including CSXT's Leewood Yard). BBB uses these other companies, at an additional charge, to receive transloaded forest products for its own account and the accounts of some of its customers.

Shortly after embargoing the line, CSXT began the process of seeking abandonment authorization for the line by sending to the appropriate parties, on April 9, 2001, the environmental and historic notification letters and reports required under our rules. On August 24, 2001, CSXT filed a single petition for exemption to abandon the line and the contiguous Memphis-Cordova line, believing that the proposed abandonment would be unopposed. However, BBB opposed the petition for exemption, and the petition was denied without prejudice to CSXT's refiling of an appropriate application or a petition for exemption at a later date. CSX Transportation, Inc.—Abandonment Exemption—(Between Memphis and Cordova) in Shelby County, TN, STB Docket No. AB-55 (Sub-No. 590X) (STB served Dec. 12, 2001).

CSXT then split off the line at issue here from the Memphis-Cordova line, and on March 29, 2002, filed a petition for exemption to discontinue service over (rather than to fully abandon) the Memphis-Cordova segment. That petition, which was uncontested, was granted in CSX Transportation, Inc.—Discontinuance Exemption—(Between East of Memphis and Cordova) in Shelby County, TN, STB Docket No. AB-55 (Sub-No. 615X) (STB served July 17, 2002).

After negotiations and attempts to arrange additional transportation options for BBB failed, CSXT filed an application, on July 10, 2002, to discontinue service over the line at issue here. BBB protested. Based on the record submitted by both parties, we granted the authority to discontinue service over the line in CSX Transportation, Inc.—Discontinuance—at Memphis in Shelby County, TN, STB Docket No. AB-55 (Sub-No. 618) (STB served Oct. 28, 2002) (October decision). BBB then filed a petition for reopening and stay. On November 22, 2002, the October decision was stayed to allow review of the full record. In a decision served concurrently with this decision, we are removing the “housekeeping” stay and denying BBB's petition to reopen the October decision. CSX Transportation, Inc.—Discontinuance—At Memphis, In Shelby County, TN, STB Docket No. AB-55 (Sub-No. 618) (Appeal decision).

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 11101(a), railroads have a common carrier obligation to provide service upon reasonable request. However, a carrier may temporarily embargo a line when physical conditions

on the line preclude it from being able to operate safely over the line. An embargo temporarily excuses a carrier from its common carrier obligation, but the carrier must remove the embargo and restore safe service within a reasonable period of time. An embargo that extends beyond a reasonable time can be construed as an unlawful abandonment, unless abandonment or discontinuance authority is obtained. See Bar Ale, Inc. v. California Northern Railroad Co. and Southern Pacific Transportation Company, STB Finance Docket No. 32821, slip op. at 6 (STB served July 20, 2001) (Bar Ale); Decatur County Commissioners, et al. v. The Central Railroad Company of Indiana, STB Finance Docket No. 33386, slip op. at 6 (STB served Sept. 29, 2000) (Decatur), aff'd, Decatur County Commissioners v. STB, 308 F.3d 710 (7th Cir. 2002) (Decatur v. STB).⁴

The reasonableness of an embargo is a fact-specific inquiry to be determined on a case-by-case basis. See Bar Ale at 6-7. Whether an embargo is reasonable, as well as how long an embargo may reasonably continue, is typically determined by considering various factors, such as: the cost of repairs necessary to restore service, the amount of traffic on the line, the carrier's intent, the length of the service cessation, and the financial condition of the carrier. See id. We do not apply these factors in a formulaic way, however. Rather, our objective is to determine whether the carrier's actions are reasonable under the circumstances. If an embargo becomes unreasonable, the carrier is no longer excused from its common carrier obligation, and it may be liable to shippers for damages caused by its failure to serve them. Id. at 7.

BBB does not challenge the imposition of this embargo, but alleges that the embargo became unreasonable after 4 days.⁵ We will discuss each of the factors that go into our analysis of this issue, and how we weigh and balance these factors in reaching our conclusion that the embargo in this case did not become unreasonable.⁶

⁴ See also GS Roofing Products Co. v. STB, 143 F.3d 387 (8th Cir. 1998) (GS Roofing), and the cases cited therein.

⁵ Opening statement at 9.

⁶ Although, as explained below, we find that the embargo has not been shown to be unreasonable, we reject CSXT's argument that BBB could not prevail because BBB did not make a reasonable request for rail service. We find that BBB has sufficiently expressed its desire and intent to use the rail line. See Overbrook Farmers Union – Petition for Declar. Order, 5 I.C.C.2d 316, 325 (1989) (Overbrook).

Cost of Repairs to the Bridge.

The cost of the repairs involved is a very significant issue in most embargo cases. In GS Roofing, for example, the court found that the embargo became unreasonable principally because the owner of the line could have made minor, inexpensive repairs that would have permitted safe service over washed out track, at least for the short term. By contrast, in Decatur v. STB, where substantial and costly repairs would have been necessary “[t]o operate at all,” 308 F.3d at 715, the embargo was not considered unreasonable.

Here, BBB contends that CSXT could have made minor repairs that would have permitted CSXT to reinstitute service over the line at minimal cost within a few days. More specifically, according to BBB’s expert, Mr. Harvey H. Stone, service could have been restored, at a cost of \$4,719, simply by posting⁷ three pilings on the bridge, which BBB asserts would have taken no more than a day to complete. In the alternative, BBB argues that CSXT could have reinstituted service by replacing only the bridge components marked “critical” in CSXT’s June 2002 bridge inspection report, while leaving in place those marked “bad” or “reject.” These repairs, according to BBB, would have taken no more than 4 days to complete and would have cost only \$17,753.⁸

CSXT counters that the bridge has reached the end of its useful life, due to its age and fire damage, and could not be made safe without more significant repairs. CSXT’s expert, Mr. Davidson, testified that a bridge is only as safe as the sum of its components, and that many of this bridge’s components are severely damaged. He based his opinion on three inspections carried out by CSXT (in January 2001, February 2001, and June 2002), which employed various testing methods, including the pick test, visual inspection, sounding and drilling.

Based on these inspections, Mr. Davidson found problems with all of the bents, the stringers and the bridge deck. He concluded that safe operation over the bridge would require the posting of 28 pilings and the replacement of 11 caps, 120 stringers, all flooring, and all curbs on the bridge deck. CSXT calculates the total cost to make the repairs needed to allow safe operation over the bridge to be \$214,500. CSXT’s calculation of repair costs is supported by an independent contractor’s inspection report, which estimates that \$265,00 in repairs would be required to return the bridge to service.

⁷ Posting means cutting out the decayed portion of a piling and patching it.

⁸ In its petition to reopen the October decision authorizing discontinuance, BBB offered a repair estimate of \$77,186, which, for purposes of that proceeding, envisioned more extensive repairs than BBB proposed here.

Although we carefully evaluate an operating carrier's assessment of the repairs needed for safe operation, we accord some deference to expert representatives of the operating carrier that would be held responsible in the event of a catastrophic accident. See Bar Ale at 7; Decatur at 8.⁹ Here, we are not persuaded that the minor repairs that BBB identifies would be adequate to assure the immediate safety of operations over the bridge. CSXT's inspection report — which is supported by its independent contractor's report and, as discussed in more detail in the October decision and the Appeal decision issued today, appears reasonable overall — indicates numerous faulty bridge components. BBB would have the carrier leave most of the damaged components in place, including those labeled “bad” or “reject,” and address only those marked “critical.” We do not believe that CSXT has acted unreasonably in deciding not to operate over a bridge made up of a multitude of “bad” and “reject” components. Indeed, BBB has failed to demonstrate whether, and for how long, safety could be assured with only the minimal repairs it advocates, or when the other damaged components would also need to be repaired or replaced to maintain safe bridge conditions.

CSXT has supported its contention that substantial repairs would be necessary before it could resume safe operations over the 80-year old, fire-damaged bridge. We do not agree with CSXT that every item it has identified would need immediate attention: CSXT has not shown that all of the existing stringers are damaged or that an upgrade of an additional three stringers per panel would be required for short-term operations over the line.¹⁰ But eliminating the costs associated with those items from the repair cost calculations would only reduce the immediate bridge repair costs to \$200,655, which is itself substantial.¹¹

In short, we do not agree with BBB that this rail line could have been put back into service with only minor and inexpensive repairs, like the line in GS Roofing. Rather, this line is more like the line involved in Decatur, which would have required substantial work at substantial cost before safe operation would have been possible.

⁹ But cf. GS Roofing, in which the operating carrier's opinion was undercut by the actual experience of a “designated operator” that was able to begin operating under a “directed service order” after performing only minimal repairs.

¹⁰ CSXT's total estimate included replacing 120 stringers, at \$355 per unit, but it has not shown that 9 of the stringers are damaged or that an upgrade of an additional 30 stringers would be necessary for the short term. We do, however, include costs for the 10 stringers needed to rebuild the timber backwalls that CSXT's expert testified are deteriorated.

¹¹ See Bar Ale at 8 (finding that a \$250,000 bridge rehabilitation was substantial).

Amount of Traffic on the Line.

The amount of traffic on the line, and the revenues that it would produce, are significant factors in assessing the relative cost of the repairs.¹² Here, in the October decision at 3, and the Appeal decision, we found that BBB — the only shipper on this line — received 198 carloads in 2000 and 33 carloads in the first two months of 2001 (which would equate again to an annual figure of 198 carloads).¹³ We also found that, based on this traffic volume, the line would generate a \$40,371 operating profit for CSXT before considering the bridge repair costs. See October decision at 8. But adding bridge repair costs of over \$200,000 into the equation would make the line unprofitable. Indeed, it would take 5 years of operations just to recoup this expenditure before CSXT could begin to make a profit again on the line.

Intent of CSXT.

Embargoes and abandonments (or, as here, authorized discontinuances under which carriers are permanently relieved of their service obligations) are closely related, and an embargo can in some cases be a step that precedes abandonment. But what a carrier may not do is use an embargo as a means of effecting an unauthorized, de facto abandonment, or driving traffic off of a line to support an abandonment application. See Bar Ale at 6. Thus, we look at the carrier's intent, as demonstrated by its actions, and we consider issues such as whether the carrier deliberately allowed the line to deteriorate to a non-operable condition to hasten the demise of a line. See Decatur v. STB, 308 F.3d at 716.

Here, CSXT acknowledges that it initiated the abandonment process about a month after it imposed the embargo, and that, except for the period of time during which it was working with BBB on

¹² Thus, when a line has significant traffic potential that could cover minimal repair costs, an embargo may be found to be unreasonable. See GS Roofing. By contrast, repair costs that significantly exceed the revenues or profits from the traffic on a line can justify even a lengthy embargo. See Bar Ale at 7, citing Overbrook, 5 I.C.C.2d at 322-23.

¹³ CSXT now disputes how many cars should be counted for purposes of computing damages. Because we find no basis for damages, however, we need not pursue this issue.

transportation alternatives,¹⁴ it has pursued its efforts to obtain abandonment or discontinuance authority ever since. But there is no evidence that this embargo was designed to effect an unauthorized, de facto abandonment, or to drive traffic off of the line to support a discontinuance application. Rather, it was the age and fire damage to the bridge that necessitated the embargo; and it was the size of the bridge repair cost in relation to the potential revenues from the line that prompted CSXT to seek authority to permanently discontinue service over the line.¹⁵ Thus, CSXT's actions in promptly seeking authority to permanently discontinue operations do not weigh against it in this case.

Length of Embargo.

The length of an embargo must be examined in the context of how long it would take to arrange for and complete the necessary repairs and what actions the carrier has taken while the line is embargoed. Here, BBB contends that the length of this embargo has been out of proportion to the short time (1 to 4 days) and minor costs (less than \$18,000) it claims would be required to make immediate repairs to the bridge and restore rail service over the line. But as discussed above, we have found that the repairs that would be needed are far more extensive than BBB assumes. As a result, both the time needed to make the repairs (a minimum of 3 to 6 months, according to CSXT) and the costs (at least \$200,000) would be far more substantial than BBB claims. Nor has CSXT failed to take action here. Rather, throughout the period of this embargo, it has tried to resolve what should be done with the line, it promptly sought abandonment authority, and then, after working to enhance transportation alternatives for BBB, it sought a determination from us that it may permanently discontinue service over the line. See Decatur at 20 (finding an embargo of comparable duration to be reasonable).

¹⁴ CSXT contends, and BBB does not dispute, that both parties explored moving BBB's operations to CSXT's Leewood Yard, where CSXT was willing to make substantial room available and extend certain tracks for BBB's transload operations. According to CSXT, the parties could not reach agreement because BBB insisted on a covered facility on the property and did not offer to assist in financing this new \$385,000 facility. CSXT also explored selling or leasing the line to The Paducah and Louisville Railway, Inc., but that railroad — like CSXT — concluded that traffic levels on the line would not justify the cost of repairing the bridge.

¹⁵ This is not to say that the filing or pendency of an application for discontinuance or abandonment authority would make an otherwise unreasonable embargo lawful. See ICC v. Maine Cent. R.R., 505 F.2d 590, 595 (2d Cir. 1974).

Financial Condition of CSXT.

Finally, whether the carrier is financially able to make the necessary repairs may be relevant to the reasonableness of an embargo. A carrier's strapped financial condition may be given substantial weight in assessing the reasonableness of its decision not to expend substantial funds on an embargoed line. On the other hand, the fact that a carrier has sufficient funds does not, by itself, mean that expensive repairs would be financially justified or legally necessary for a money-losing line that it seeks to abandon. Here, CSXT is a large carrier with the financial resources to be able to fund the repair of this bridge, if necessary. But as we have noted, the fact that it is able to make the expenditures does not mean that it should be penalized for not having done so.

Weighing of the Factors.

When we weigh all of these factors, we conclude that this embargo was not unreasonable. The costs for CSXT to make the necessary repairs so that it would be able to safely operate over the bridge would far exceed the annual profits that CSXT might expect from the anticipated traffic from the line. CSXT is not to blame for this situation, and the carrier acted reasonably in deferring such a large additional investment in this line until we could determine whether it should be relieved of responsibility for providing future service over the line. CSXT acted promptly in seeking abandonment or discontinuance authority. That it had the overall financial resources to make costly repairs does not mean that it had to do so before it obtained a determination from us as to its future responsibilities for this line. To the contrary, we find that the embargo was not unreasonably long, given the magnitude of the repair expenses and the pendency of the regulatory proceedings to resolve the future status of the line.

Accordingly, BBB's complaint will be denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The request for partial revocation of the class exemption in Rail Exemption – Lumber or Wood Products, 7 I.C.C.2d 673 (1991), is denied.
2. The complaint is denied, and this proceeding is discontinued.
3. This decision is effective on June 14, 2003.

STB Finance Docket No. 34236, et al.

By the Board, Chairman Nober and Commissioner Morgan.

Vernon A. Williams
Secretary